IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 93-03009**
ENROSE FARMS, INC.,	)	
	)	
Debtor.	)	
_____	)	
	)	
NOTUS HOP, INC.,	)	
	)	**Case No. 93-03010**
Debtor.	)	
_____	)	
	)	
ENROSE FARMS, INC., NOTUS HOP, INC., NORMA E. BATT, individually and as Co-Trustee of Trust B, VERNON M. and NORMA E. BATT FAMILY TRUST under Trust Agreement 11/25/86 and TIMOTHY A. BATT, individually and as Co-Trustee of Trust B, VERNON M. and NORMA E. BATT FAMILY TRUST, under Trust Agreement 11/25/86 and the VERNON M. and NORMA E. BATT TRUST,	)	**Adv. No. 98-6191**
	)	
	)	**MEMORANDUM OF DECISION**
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Plaintiffs,	)	
	)	
vs.	)	
	)	
S. S. STEINER, INC.,	)	

RONALD D. SCHOEN, Trustee, and STEVE ADAMSON and SHERIFF CANYON COUNTY, IDAHO,

Defendants.

Daniel L. Hawkley, Boise, Idaho and William L. Needler, Northbrook, Illinois, for Plaintiffs.

Jerry Jensen, ROSHOLT, ROBERTSON & TUCKER, Twin Falls, Idaho, for Defendant Ronald D. Schoen, Trustee.

Richard B. Eismann, Nampa, Idaho, for Defendant S. S. Steiner, Inc.

Background.

Plaintiffs, the entities comprising a family farming operation and their principals, filed this adversary proceeding against a creditor, S.S. Steiner, Inc. ("Steiner"), and the County Sheriff, to enjoin a state court foreclosure sale of a portion their farm land. They did so on the eve of that sale, and only after contesting Steiner's foreclosure action through trial in state court.

However, Plaintiffs also sued Chapter 12 Trustee Ronald Schoen ("Schoen") alleging that he had failed to properly account in the bankruptcy proceedings of Plaintiffs Enrose Farms, Inc. and Notus Hop, Inc., that he had improperly paid S.S. Steiner, Inc. ("Steiner"), and that he had otherwise failed to satisfy his duties as Trustee. Plaintiffs sought removal of Schoen as Trustee,

damages, attorney fees and costs. These were indeed serious allegations of misfeasance and malfeasance by a bankruptcy trustee.

Finally, Plaintiffs also named their former bankruptcy attorney as a Defendant, claiming he was negligent in representing them in the bankruptcy case. That attorney has since been disbarred.

During the course of the action, Plaintiffs voluntarily dismissed the claims against Steiner and the Sheriff, and the Court granted summary judgment as to Plaintiffs' claims against Schoen. To no surprise of the Court, Defendants Steiner and Schoen have now moved for sanctions against Plaintiffs' counsel. A hearing was held on the sanctions motions on December 9, 1998, after which the Court took the issues under advisement.

After due consideration, the Court concludes sanctions are appropriate. A detailed discussion of the unfortunate history of this action and the supporting facts and reasons for the Court's conclusion follows. F.R.B.P. 7052.

Facts.

Enrose Farms, Inc. and Notus Hop, Inc. filed for Chapter 12 relief in 1993. Each had a reorganization plan confirmed by the Court on June 1,

1994. Under the plans, Schoen as Trustee was obligated to sell certain real and personal property of Debtors, and to use the proceeds to pay claims of creditors, including the substantial secured claim of Steiner. When Schoen proposed to sell a significant asset under the plans, he would file a motion for such authority with the Court, set the motion for a hearing, and invite the other parties in the case by written notice to submit any objections to the proposed sales and to attend the hearing before the Court. On several occasions, the Court entertained and adjudicated objections, mostly originating with the principals of the Chapter 12 debtors, who are some of the Plaintiffs in this action.

As it turns out, after several years of marketing efforts by Schoen, sale of the assets of the Chapter 12 businesses did not yield enough to pay Steiner's claim in full. As a result, Steiner sought to foreclose a mortgage it held on other real property not involved in the Chapter 12 cases, owned by the non-Chapter 12 Debtor-Plaintiffs, to satisfy the balance of its debt, amounting to over $300,000. Plaintiffs contested that foreclosure action, and it eventually went to trial in state district court. Daniel L. Hawkley ("Hawkley"), an Idaho attorney, represented some of the Plaintiffs in the state court foreclosure proceedings at trial in February 1998. The state court granted Steiner a foreclosure decree. Apparently, no appeal was taken.

A sheriff's foreclosure sale was scheduled by the state court to be conducted on Tuesday, July 21, 1998 at 10:00 a.m. in Caldwell, Idaho. A few days before the sale was to occur, Plaintiffs sought the help of attorney William L. Needler ("Needler") from Illinois to stop the sale. Hawkley was retained to act as local counsel, and to work as co-counsel with Needler.

Needler has had considerable experience in bankruptcy cases, and in particular, with farmer debtors. In consideration of a $1,500 fee, Needler, who had no prior relationship with the Batts, agreed to fly to Boise from Chicago to meet with them. At their Friday, July 17 conference, Batts told Needler, among other things, that they had never received an accounting of the funds disbursed in the Chapter 12 cases by Schoen. They complained about the manner in which Schoen had liquidated the assets of the Chapter 12 businesses. They also asserted that Steiner had inflated its creditor claim in the bankruptcy cases by $50,000, an amount Steiner had agreed to loan them, but that had never actually been advanced. Needler claims to have reviewed certain unspecified documents given him by Batts, including copies of some papers that had been filed in the bankruptcy cases, together with transcripts of unspecified court proceedings, and sworn statements of Norma Batt.

On the morning of Saturday, July 18, Needler met Hawkley for the first time. The two attorneys reviewed and discussed the status of the pending Chapter 12 cases; Steiner's claim; payments that had been made on the Steiner claim; the circumstances surrounding the disbarment of attorney Steve Adamson, who had represented the debtors in the bankruptcy proceedings; and what to do about the July 21 foreclosure sale. The two lawyers agreed to the filing of an adversary proceeding in the Bankruptcy Court to obtain an injunction to prevent the upcoming foreclosure sale. Needler explained to Hawkley the allegations that would be included in the adversary Complaint and the lawyers agreed that Needler would draft the Complaint and send it to Hawkley for filing.

Needler left Boise on Saturday afternoon and prepared the draft Complaint during the return flight. Needler faxed a copy of the Complaint, along with a proposed motion for injunctive relief, to Hawkley for filing. Hawkley prepared Norma Batt's affidavit to be filed in support of issuance of an injunction as to the foreclosure sale.[1]

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[1] On this point, the record is somewhat unclear. In one instance, Needler claims that he and Hawkley relied on Norma Batt's sworn declaration as a basis for drafting the Complaint. Memorandum in Support of Objection to Award of Sanctions, filed on December 7, 1998, at 5. Later, Needler states that the Complaint was faxed to Hawkley, and that only then did Hawkley prepare Batt's Affidavit. Needler's Motion to Strike Hawkley's Second Affidavit, filed on December 31, 1998, at 4. Needler's second version is consistent with Hawkley's recollection of the events. Hawkley states that he prepared Batt's Affidavit using the adversary Complaint Needler had faxed to him. Second Affidavit of Daniel L. Hawkley, p. 4-5.

On Monday, July 20, at 4:40 p.m., Hawkley filed Plaintiffs' Complaint with the Court. As agreed by the lawyers, the Complaint designated Needler and Hawkley as co-counsel for the Plaintiffs.[2] On Tuesday, July 21, Norma Batt signed an affidavit, which was filed with the Court along with an emergency motion for injunctive relief at 8:22 a.m. Plaintiffs' Complaint named Steiner and the County Sheriff as Defendants. The Complaint and the supporting affidavit alleged that Steiner had overstated its claim in the bankruptcy proceedings by $50,000 and that such overstatement was intentionally false. Plaintiffs' Complaint demanded that Schoen provide an accounting for all Chapter 12 funds paid to Steiner and that credit be given against Steiner's claim for the $50,000 that allegedly was never advanced to the Batts. Plaintiffs sought an issuance of an immediate *ex parte* stay of the foreclosure sale.

Plaintiffs' Complaint also named Schoen as a Defendant. The Complaint alleged that Schoen had failed to investigate the validity, nature and extent of Steiner's claim, that Schoen had failed to carry out his duties as

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[2] Hawkley later sponsored Needler's admission to the bar of this Court, *pro hac vice*, as provided by L.B.R. 9010.1, which in turn incorporates Dist.Id.L.Civ.R. 83. Those rules recognize the inherent powers of the courts to impose sanctions to discipline attorneys, and also provide that "[n]o attorney permitted to practice before this court shall engage in any conduct which . . . in any manner interferes with the administration of justice." L.R.B. 9010.1 (g), (h)(2) and D.Id.L.Civ.R. 83.5(a) and (b)(1).

Trustee according to the law, that such actions constituted misfeasance and malfeasance on account of which he should be removed and be responsible for damages. Specifically, Plaintiffs accused Schoen of failing to properly market and value property of Enrose Farms, gifting certain farm equipment to the buyer of the farm ground, renting the farm property without Court approval, disbursing moneys owed as rents to the bankruptcy estates, ordering Mrs. Batt to pay her attorney without Court authorization, and of engaging in the unlawful practice of law.

Finally, the Complaint named Steven Adamson, the Chapter 12 bankruptcy lawyer as a Defendant, and asserted he was guilty of professional malpractice in handling the bankruptcy cases.

When presented with the Complaint supported by Batt's affidavit requesting immediate relief, the Court convened an emergency hearing at about 8:30 a.m. on July 21. While Hawkley advised the Court that copies of the pleadings had been faxed to counsel for Steiner at 7:00 a.m. on July 21, it is now apparent that Defendants had no effective notice of this hearing. However, based upon the sworn statements in the file, together with the representations of counsel both in the pleadings and made by Hawkley at the hearing, the Court felt compelled to grant a temporary stay of the foreclosure sale. As a result, the

sale was not held. The Court also directed that an evidentiary hearing be held in the action on August 5 to determine whether the Court should issue a preliminary injunction further enjoining the sale during the pendency of the adversary proceeding.

Neither Needler nor Hawkley appeared on August 5 for the hearing. At that time, Steiner and Schoen, through their lawyers, appeared and stipulated to continue the hearing to September 2 so that they may have time to prepare for the hearing. They also stipulated that no foreclosure sale be conducted in the interim.

Steiner filed a detailed opposition and brief in anticipation of the September 2 hearing. At that hearing, Needler and Hawkley both appeared, as did counsel for Steiner and Schoen. Without prior notice to either the Court or to opposing counsel, Needler and Hawkley volunteered to dismiss the two counts of Plaintiffs' Complaint stating claims against Steiner and the sheriff, and agreed to the dissolution of the temporary stay so that the foreclosure sale could go forward. While Plaintiffs' action against Steiner and the sheriff was concluded in this fashion, Plaintiffs announced their intention to pursue their claims against Schoen and Adamson.

On August 7, Schoen had filed and served his Answer denying the allegations of Plaintiffs' Complaint. On September 22, Schoen filed a motion for summary judgment as to the claims asserted by Plaintiff against him, together with supporting papers and briefing. The motion came on for hearing before the Court on October 14. Plaintiffs filed no opposition to the motion. Moreover, neither Needler nor Hawkley appeared at the hearing. This came as something as a surprise to the Court, since Plaintiffs' lawyers had not advised the Court or counsel for Schoen of their intention to skip the proceeding. At the hearing, and after considering Schoen's motion and submissions, the Court granted the motion and dismissed Plaintiffs' claims against him.

On October 27, Steiner filed a Motion for Attorney Fees and Costs seeking, as sanctions, an award of its litigation expenses against Plaintiffs and their counsel. Schoen filed a Motion for Sanctions against Plaintiffs' counsel on November 5. The parties have engaged in substantial briefing and argument concerning the motions. Both motions were heard by the Court on December 9. At that hearing and since, Hawkley has conceded that sanctions are appropriate. Needler contests the sanctions motions. The Court took the motions under advisement.

Discussion and Disposition of the Issues.

The issue presented is whether Needler and Hawkley should be subject to monetary sanctions based upon their conduct in initiating and prosecuting this action against these two Defendants. After review of the record, while the Court disdains the prospect of criticizing the lawyers who appear before it, there is no doubt that sanctions are required.

Defendants seek an award under Rule 9011 of the Federal Rules of Bankruptcy Procedure.[3] This Rule, which provides for sanctions against any party who files pleadings in this Court in violation of the rule's requirements, essentially mirrors Federal Rule of Civil Procedure 11, and courts considering sanctions under Rule 9011 generally rely on Rule 11 for guidance. *Valley National Bank of Arizona v. Needler (In re Grantham Brothers)* 922 F.2d 1438, 1441 (9th Cir. 1991), *cert. denied* 502 U.S. 826 (1991)(affirmation of award of sanctions imposed against Mr. Needler for his "failure adequately to investigate the circumstances of the sale and the bankruptcy court's order").

[3] Rule 9011 was amended in 1997 to conform to the amendments made to Rule 11 of the Federal Rules of Civil Procedure in 1993. The amended version of Rule 9011 became effective on December 1, 1997, and applied to all pending proceedings in bankruptcy cases and to any proceedings commenced thereafter. *In re Russ*, 218 B.R. 461, 467 (Bankr. D. Minnesota 1998).

Rule 9011 provides that a party's signature on a pleading submitted to the court certifies that the pleading:

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

F.R.B.P. 9011(b).

In this instance, Needler points out that Defendants did not comply with the requirements of Rule 9011(c)(1)(A), the so called "safe harbor" provision, by serving their motions for sanctions on Plaintiffs' attorneys at least 21 days prior to filing the motions with the Court. In this argument, Needler is correct.

Rule 9011(c) authorizes a court to award sanctions only if certain enumerated conditions are met. One such condition is that:

> The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected . . . .

F.R.B.P. 9011(c)(1)(A). The purpose of this provision is to provide a "safe harbor" in which a party will not be subject to sanctions unless, after being served with the motion, the party fails to withdraw its position or fails to appropriately correct that position. F.R.C.P. 11, Adv. Comm. Notes, 1993 Amendments.

In this case, Steiner's Motion for Attorney Fees and Costs was served on Plaintiffs' counsel and filed with the Court on October 27, 1998, while Trustee's Motion for Sanctions was not served until November 3, 1998, and filed November 5. Both motions were clearly filed with the Court within 21 days of service on counsel. The Court had already entered summary judgment for Trustee on October 22, 1998, and the claims against Steiner had been withdrawn on September 2. Thus, Needler and Hawkley were not given an opportunity under the "safe harbor" provision to either withdraw the offensive pleadings or to otherwise remedy their sanctionable conduct. Since the purpose

of the “safe harbor” provision was arguably defeated here, an award of sanctions should not be made pursuant to Rule 9011 under these circumstances. *See Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998)(even though movant had given opposing counsel multiple warnings about the defects in counsel’s claim, since the warnings were not in the form of a motion served on counsel, sanctions could not be awarded).

Another basis the Federal courts frequently employ to police obstreperous conduct by litigants and their lawyers is 28 U.S.C. § 1927. This statute provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Section 451 of Title 28, a definitional provision, states that:

> The term “court of the United States” includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

28 U.S.C. § 451. Based upon this definition, the phrase "any court of the United States" found in Section 1927 and other provisions of Title 28 has been interpreted by the Ninth Circuit Court of Appeals to exclude bankruptcy courts. *Perroton v. Gray (In re Perroton)*, 958 F.2d 889 (9th Cir. 1992)(bankruptcy court did not have the power to waive fees under 28 U.S.C. § 1915 since it was not a court of the United States). While *Perroton* dealt with a different provision of the judicial Code, the Bankruptcy Appellate Panel of the Ninth Circuit interpreted the reasoning of *Perroton* to apply with the same force to Section 1927. *Determan v. Sandoval (In re Sandoval)*, 186 B.R. 490, 496 (9th Cir. B.A.P. 1995). In light of this authority, the Court is not inclined to impose sanctions pursuant to 28 U.S.C. § 1927.

While Rule 9011 and Section 1927 may not be available to the Court in this action, the Court is not without authority to impose sanctions against Plaintiffs' attorneys. This is because the Court has the inherent power to punish misconduct by lawyers who appear in this Court. Bankruptcy Code Section 105(a) provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any

> determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

The United States Supreme Court has held that the sanctioning schemes of the various statutes and rules do not displace a court's inherent power to award sanctions in certain situations. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). Included within the inherent power of a court is the ability to assess sanctions in the form of attorney fees and costs "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 45-46 (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975)). Although *Chambers* has been argued to apply only to Article III courts, the Ninth Circuit has explained by enacting the "to prevent an abuse of process" language of Section 105(a) that "Congress impliedly recognized that bankruptcy courts have the inherent power to sanction that *Chambers* recognized exists within Article III courts." *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996).

Therefore, under Section 105, the bankruptcy court has the power to impose sanctions to deal with the practices of a party or an attorney who wilfully abuses the judicial process. *Mortgage Mart, Inc. v. Rechnitzer (In re*

Chisum), 68 B.R. 471, 473 (9th Cir. B.A.P. 1986). This statute gives the bankruptcy court sufficient authority "to ensure that attorneys who practice in front of it meet at least the minimal requirements of professional ethics . . . ." *In re Hessinger & Associates*, 192 B.R. 211, 216 (N.D. Cal. 1996). "A specific finding of bad faith, however, must 'precede any sanction under the court's inherent powers.'" *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986)(attorney sanctioned for tardiness). The Ninth Circuit BAP is uncertain as to the extent to which *Stoneberger* applies, questioning whether the bad faith requirement extends beyond cases in which the sanctionable conduct was only directed toward the court. *Peugeot v. United States Trustee (In re Crayton)*, 192 B.R. 970, 977 (9th Cir. B.A.P. 1996). Specifically, the BAP failed to extend *Stoneberger* to a case in which an incompetent attorney had been sanctioned since the inherent powers of the court had been "exercised to protect the public against unqualified practitioners." *Id.* In addressing a district court's inherent power to sanction, the Ninth Circuit has stated that the bad faith requirement is likely limited to fee shifting cases, *Unigard Security Insurance Company v. Lakewood Engineering & Manufacturing Corporation*, 982 F.2d 363, 368 (9th Cir. 1992), and that a court can use its inherent powers to sanction upon a finding of

recklessness or bad faith, *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994).

Regardless of whether the applicable standard requires bad faith or merely reckless unprofessional conduct by counsel, the Court concludes that there is more than enough justification in this action for the imposition of sanctions against both Hawkley and Needler under Section 105.

First of all, so there is no misunderstanding, the Court acknowledges that Needler and Hawkley were retained to evaluate their clients' rights and remedies, and if appropriate, to act, under the considerable time pressures imposed by the impending foreclosure sale. Certainly, the exigencies of the situation constitute an important factor to consider in weighing the propriety of the lawyers' conduct. However, the existence of a deadline for action is not an excuse for attorneys to abdicate their professional responsibility to act reasonably toward the Court, other counsel and other parties.

Even considering the timing concerns, the Court concludes that both Needler and Hawkley failed to act professionally in this matter. They did so in two ways. First, they failed to do even a minimally adequate investigation of the relevant facts in this case prior to commencing suit against Steiner and Schoen. Second, to compound their exercise of poor professional judgment,

after filing the Complaint, counsel made no affirmative effort to substantiate the claims they had asserted, or to remedy the inconvenience and expense they occasioned on the other parties to the action.

More particularly, a review of the record shows that Needler made only cursory efforts investigate the facts before filing the Complaint. Needler conferred with his clients and listened to their unsubstantiated assertions of wrongdoing against their creditor and the Chapter 12 trustee. Needler contends that the Batts provided him with several documents filed in the bankruptcy cases, which he reviewed during his visit to Boise. However, based upon his extensive experience as a bankruptcy lawyer, he must have known that the file documents he was reviewing were an incomplete representation of the record in the bankruptcy cases, and therefore an unreliable indicator of the true history of the cases and status of the files. Based upon this scant review of the details, Needler decided his clients should sue Plaintiffs' creditor, the bankruptcy Trustee, the sheriff and Plaintiffs' former lawyer.

Since the events and consequences of the Chapter 12 cases have a pervasive impact on the merits of Plaintiffs' claims, the Court is astounded that Needler never attempted to access or review the Court's official files before

commencing this action.[4] In addition, Needler never attempted to contact counsel for Steiner to discuss the case or to verify his information, nor did he attempt to contact Schoen to ask questions or to obtain the facts. There is also no indication in this record that Needler ever discussed the merits of the claims in detail with Hawkley, who had prior experience with Mrs. Batt and who had represented the clients in the state court foreclosure trial. Needler did not attempt to review the state court files. Needler had no past experience with the Batts. If not ethics, simple logic would dictate that, in order to make an independent assessment of the case, Needler should investigate the facts beyond simply visiting with the Batts and reviewing what were obviously some, but not all, of the relevant court documents. His failure to do so, coupled with his later failure to pursue the prosecution of any of the claims, clearly suggests that filing the adversary Complaint was merely a tactic designed to "buy time" and to interfere with the sheriff's sale of Plaintiffs' assets under a valid state court judgment. This is further evidenced by the fact that the claims stated against Steiner had been fully litigated in the state court action. His failure to even

[4] In addition to having all day Friday and Monday to physically inspect the Court's files, electronic copies of the contents of these files are available to the public from any personal computer with an internet connection. The Court refuses to accept Needler's excuse that time constraints did not allow him to review the Chapter 12 case files before the adversary proceeding was filed.

review the Court's Chapter 12 case files indicates that the suit brought against Schoen as trustee was likewise grounded in improper motives.

Hawkley is guilty of similar recklessness in failing to review the bankruptcy files. Without knowing what had transpired in the Chapter 12 cases, how could Hawkley condone an allegation in the adversary Complaint that Schoen was guilty of dereliction of his duties as Trustee? In addition, Hawkley had represented Mrs. Batt in the Steiner state court foreclosure trial. During that trial, Batt, through Hawkley, specifically challenged the amount due on Steiner's claim. The state court received evidence on the issue and rejected Batt's arguments. In light of Hawkley's experience and knowledge, how could he endorse the allegations against Steiner in the adversary proceeding asserting a near identical challenge to Steiner's claim?

Hawkley also failed to verify or validate Mrs. Batt's assertions after he signed and filed the Complaint. Hawkley stated in his Second Affidavit that it became apparent to him during the state court proceedings "that Mrs. Batt did not comprehend the complexities of Steiner's liens and promissory notes, that her understanding of the facts was not accurate, and that she misconstrued and had very limited understanding of legal matters." Second Affidavit of Daniel L. Hawkley, p. 4. Given his apprehension, Hawkley had ample reason to doubt the

validity of the asserted claims. However, Hawkley failed to undertake an investigation even into his own files from the state court litigation.[5]

The two lawyers' conduct after filing the bankruptcy Complaint and temporarily stopping the sale is even more disappointing to the Court. It is undisputed that once filed, Needler and Hawkley did not communicate in any real detail about the case until the eve of the September 2 hearing on the preliminary injunction. At that point, having done no further investigation of the facts, and supposedly based solely upon a review of certain exhibits attached to Steiner's Memorandum in Opposition to Plaintiffs' Motion for Injunctive Relief and for a Temporary Stay, Needler and Hawkley concluded there was no good faith basis for the claims against Steiner.

There were two exhibits submitted in support of Steiner's Memorandum. One consists of an itemized summary of the Steiner debt calculated as of the date of the bankruptcy filings, a statement of much of the same information that had been included in Steiner's proof of claim previously filed with the Court in the Chapter 12 cases. The other exhibit is a summary of payments made by the Chapter 12 Trustee on Steiner's claim during pendency

[5] In his first affidavit filed December 1, 1998, and at the December 9 hearing, Hawkley candidly admitted that he failed to conduct an adequate inquiry into the facts of this action and that sanctions were appropriate.

of the Chapter 12 cases. This summary had been previously produced to Plaintiffs and their attorney months earlier and was actually admitted into evidence during the foreclosure trial (i.e. State Court Exhibit 1). When Needler and Hawkley examined these exhibits, they discovered that Steiner's claim was not inflated by the $50,000 alleged by Plaintiffs. Since both these documents were readily available to counsel, had they attempted to find them either before or after filing the adversary proceeding, the lawyers could have concluded that there was no claim to be made against Steiner, and the time and expense expended by Steiner in defending against Plaintiffs' bankruptcy Complaint could have been avoided completely.

To make matters worse, once Hawkley and Needler concluded that the claims against Steiner had no merit, they attempted to broker a settlement with Steiner's counsel, Mr. Eismann, only minutes before the hearing began. Mr. Eismann informed the duo that while his client would certainly entertain settlement proposals, the person with the authority to accept a settlement on behalf of his client could not be reached prior to the hearing. Upon hearing this, Needler and Hawkley informed Mr. Eismann that Plaintiffs' claims against Steiner would be dropped and the injunction against the foreclosure sale could be dissolved. This tactic smacks of blatant bad faith. In essence, Needler and

Hawkley knew they were attempting to use a meritless or frivolous claim to extract concessions from Steiner. *See Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1997)("Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent."). This approach to litigation is offensive.

In short, both Hawkley and Needler were guilty of unprofessional conduct in failing to do even a minimum inquiry into the merits of their claims against Steiner, either before or after filing the suit against the creditor. For this conduct, counsel should be sanctioned.

Counsel's approach to suing Schoen is subject to equal criticism. Keep in mind, Schoen's only involvement in this matter arises from his status as the Chapter 12 Trustee in the related bankruptcy cases, a role he had occupied for several years prior to the commencement of this adversary proceeding. In spite of this, neither Needler nor Hawkley bothered to arm himself with the basic facts which could be gleaned from a review of the Court's files concerning Trustee's actions in the Chapter 12 cases. Had they done so, they would have been exposed to an abundance of information, dates, events and facts about the the administration of the bankruptcy cases. Moreover, they would have inevitably discovered that Schoen evidently performed his duties in accordance

to the terms of the confirmed Chapter 12 plans, and that all significant actions he undertook were approved by this Court after notice to all parties in the cases, an opportunity to object to the proposed actions, and most often after a hearing before the Court. While this information was available for inspection in person at the office of the Clerk of the Court in Boise on Friday, July 18 and on Monday, July 20, and was available electronically, free of charge, 24 hours a day, both Needler and Hawkley felt obliged to forego an examination of the Court's official files, before and after suing Schoen.

Plaintiffs' lawyers' reaction to Schoen's Motion for Summary Judgment evidences their cavalier approach to their duties in this action. Neither Needler nor Hawkley were inclined to oppose Schoen's motion. They apparently did not feel obliged to inform Schoen or his counsel that they would not be contesting the motion, nor did they inform Schoen, his attorney or the Court that neither would attend the hearing on the motion. Similar to their approach to the Steiner claims, in essence, Needler and Hawkley decided not to oppose the motion or attend the hearing when they discovered that there was no merit to support their claims against Trustee from a review of the submissions made by Schoen to the Court with his motion. Once again, these submissions

came almost exclusively from the Court's files concerning Schoen's activities as Chapter 12 Trustee.

Needler argues that it was Schoen's responsibility to demonstrate to Plaintiffs' lawyers that Plaintiffs' claims against him had no merit. Needler offers no legal basis for his argument for shifting his duty to investigate his client's case to another party. A defendant in a civil action is not obliged to disprove the plaintiff's claims. Since Schoen was not contacted prior to being sued, it is difficult to see how he could warn Needler and Hawkley that they were about to make a big mistake. After the action was commenced, Schoen's Answer denying the allegations Plaintiff's Complaint, filed on August 7, served as fair warning that Plaintiffs and their lawyers would be put to their proof. The near absurdity of this argument evidences why Needler and Hawkley should be sanctioned for their conduct in connection with suing Schoen.

Finally, if the record against Needler and Hawkley were not evidence enough of disappointing conduct, the Court must comment upon what has transpired in this action at and since the December 9 hearing on the motions for sanctions. In an emotional statement made at the hearing, Hawkley admitted that his conduct was inappropriate, apologized to the Court and counsel for any expense and inconvenience caused by his approach to the case, and conceded

that some sort of sanction should be levied. The Court accepts Hawkley's position and feels his contrition is sincere.

Needler, by contrast, continued his contentious ways, admitted no wrong, and attempted to blame others for the outcome of the case, including Defendants and Hawkley. This response to the sanctions motion was, in the Court's opinion, misguided.

Moreover, Needler and Hawkley have now turned against one another, each offering different versions of the events of the case in a series of affidavits filed with the Court. Needler swears that at no time did Hawkley inform him of the evidence produced by Steiner in the state court action, or that Hawkley may have had some reservations about the factual allegations advanced by Mrs. Batt, and incorporated in the Complaint and her affidavit. Hawkley, on the other hand, states in his first affidavit that he relied totally upon the investigation and judgment of Needler in bringing this action, admitting that he failed to conduct a reasonable inquiry into the claims. Needler and Hawkley question each other's veracity, and Needler seeks the right to do discovery on these issues.[6]

[6] Needler has moved this Court to strike Hawkley's Second Affidavit because Needler believes the statement to be false, and asks leave of the Court to propound discovery in the action concerning the attorneys' conduct. However, the Court finds that Hawkley's Second Affidavit appears to represent a credible version of what exactly transpired. Discovery on the issue will, in the Court's opinion, accomplish nothing

To the Court, this posturing by counsel seems at the same time laughable and sad. There is ample undisputed evidence in this record of dilatory conduct by both Needler or Hawkley. "Finger-pointing" by counsel is not constructive, and instead renders the record clear that a significant problem exists. Viewed simply, the two attorneys initiated this action jointly, cooperatively, and as a team. The failure of either to communicate important information about the case to the other is not an excuse for his recklessly filing and prosecuting an adversary Complaint for which there is no basis. The lawyers' conduct in this instance, which can only be explained as a tactic to stall a creditor's legitimate right to foreclose its mortgage, constitutes not only an imposition on the rights of the other parties to the action, it is an abuse of the judicial process, for which both lawyers are responsible for not preventing, or at least mitigating. The purpose for imposing sanctions for such conduct here is not just to compensate Defendants for the expense incurred in defending the frivolous law suit. An equally important justification is to deter such conduct in the future.

At the suggestion of the Court, both Steiner and Schoen have filed detailed itemizations of their litigation expenses incurred in this action. Steiner

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but additional expense, delay and burden on the parties and the Court. Needler's Motion to Strike will be denied.

incurred fees and costs of $8,099.22 for defending Plaintiffs' claims. In addition, Steiner alleges it has incurred $9,864.39 in fees and costs in pursuit of sanctions. Needler objects to the reasonableness of Steiner's recovery of these amounts; Hawkley is silent. The Court has reviewed the supporting itemization and finds, in the exercise of its discretion, that the appropriate monetary sanction as to the Steiner claim is $10,000. Needler and Hawkley shall be jointly and severally obligated to pay this amount to Steiner. However, a portion of the sanction is intended by the Court to address the conduct of the lawyers in connection with their responses to the motions for sanctions. In this regard, since Hawkley has not actively resisted those motions and has acknowledged his offensive actions, the Court hereby allocates responsibility for the sanction, as between the two lawyers, $6,000 to Needler and $4,000 to Hawkley.

Schoen incurred $7,709.30 in fees and costs in defending Plaintiffs' actions including the summary judgment motion. In addition, Schoen incurred fees and costs of $6,807.58 in connection with his Motion for Sanctions. The Court, in its discretion, determines the appropriate sanction is $10,000. Needler and Hawkley shall be jointly and severally liable to pay this amount to Schoen. The Court hereby allocates responsibility for this sanction, as between the two lawyers, at $6,000 to Needler and $4,000 to Hawkley.

Conclusion

For the reasons set forth above, Needler and Hawkley shall be jointly and severally sanctioned in the total amount of $20,000, allocated as set forth above, to partially compensate these parties for the costs incurred in defending against the adversary proceeding and in prosecuting the sanctions motions. In addition, such award is intended to demonstrate the Court's dissatisfaction with the attorneys' conduct in this case, and should serve to deter similar conduct in other cases. These sanctions are appropriately awarded under the inherent powers granted this Court under Section 105(a) of the Bankruptcy Code and otherwise.

The Court expects Needler and Hawkley to pay the sanctions to Steiner and Schoen within thirty days and to file an affidavit with the Court attesting that they have done so. If additional action is required by Steiner or Schoen to enforce payment according to these terms, the Court reserves the right to impose additional sanctions. Needler's Motion to Strike Hawkley's affidavit will be denied. A separate order will be entered.

DATED This _____ day of March, 1999.

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JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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ADV. NO.: 98-6191

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk